

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE STATE ARTS BOARD

In the Matter of the Appeal of  
Hennepin Theater Trust

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on November 2 and 5, 2012, at the Office of Administrative Hearings, 600 North Robert Street, in St. Paul. The parties subsequently submitted post-hearing initial and reply briefs, as well as proposed findings. Thomas O'Hern, Assistant Attorney General, appeared at the hearing on behalf of the Minnesota State Arts Board (MSAB or Board). Thomas Johnson and Brian Dillon, Attorneys at Law, Gray Plant, Mooty law firm, appeared on behalf of the Hennepin Theater Trust (HTT or the Trust).

**STATEMENT OF ISSUES**

1. Did HTT satisfy the interim application requirements for obtaining second-year operating support funding from the Board for fiscal year 2013, including submitting application documents electronically using the Board's online system?
2. Did the MSAB fail to follow any of its policies or procedures in determining that HTT was ineligible to receive second-year operating support funding in fiscal year 2013?
3. Is HTT eligible to receive second-year operating support funding from the Board for fiscal year 2013?

The Administrative Law Judge finds that HTT demonstrated by a preponderance of the evidence that it made a good faith attempt to submit its application documents electronically and received a confirmation message from the Board's computer system. For some reason, the HTT documents were not successfully uploaded to the Board's server and thus were not received by the Board. The Administrative Law Judge further concludes that the Board failed to follow its policies and practices when it did not allow HTT to submit replacement materials after it was discovered that the documents had not been successfully uploaded to the Board's server. As a result, the Administrative Law Judge recommends that the Board rescind its prior determination that the Trust is ineligible for second-year operating support funding under its two-year OS Grant. Instead, it is recommended that the Board accept the interim grant application materials

that the Trust prepared and attempted to submit before the January 13, 2012, deadline; and, if appropriate, award the Trust its second year of funding under the OS Grant.

Based upon the files, records, and proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

### Background

1. The MSAB is a public entity created by the Minnesota Legislature under Minn. Stat. Chapter 129D. It has eleven appointed board members and an Executive Director, Sue Gens. Its annual budget is approximately \$32 million, \$30 million of which comes from the State's Legacy Fund.<sup>1</sup>

2. The Board's mission is to stimulate and encourage the creation, performance and appreciation of the arts in Minnesota. The Board operates eleven different grant programs that provide financial assistance to artists and organizations throughout the state to ensure that all Minnesotans have the opportunity to participate in the arts.<sup>2</sup>

3. HTT is a non-profit organization that owns the historic Orpheum, State, Pantages, and New Century Theatres, and is dedicated to arts-inspired community cultural development. The Trust's activities include presenting Broadway touring productions, concerts, comedy, speakers and other entertainment plus educational initiatives including programs for high schools, such as SpotLight Musical Theatre.<sup>3</sup>

4. In 2011, the MSAB launched a pilot Operating Support (OS) Grant Program to provide general operating support to established arts organizations and community arts schools. The OS Grant Program replaced two existing institutional support grant programs operated by the Board and was meant to assist qualifying organizations in maintaining ongoing programs, services, and facilities (rather than emphasizing new initiatives as a justification for funding).<sup>4</sup>

5. To obtain the initial year of funding under the OS Grant Program, applicants were required to submit a "full application" which was thereafter subject to a "full advisory panel review" by the Board. To obtain the second year of funding under the grant, applicants were required to submit an abbreviated "interim application" demonstrating that the organization was continuing to meet the expectations of the program.<sup>5</sup>

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<sup>1</sup> Testimony (Test.) of Susan Gens; Minn. Stat. § 129D.02.

<sup>2</sup> Test. of S. Gens.

<sup>3</sup> Test. of Thomas Hoch.

<sup>4</sup> Board Ex. 1 at 2; Test. of S. Gens.

<sup>5</sup> Test. of S. Gens. The Board recently started to implement a four year rotating application cycle for the OS Grant Program. Under the new process, once the initial full application is approved, applicants will

6. Full OS Grant applications require the submission of at least thirteen documents, six of which must be submitted electronically. Interim applications require the submission of at least five documents, of which two (the application form and narrative) must be submitted electronically.<sup>6</sup>

7. At all times relevant to this matter, the MSAB outsourced its website to a third-party called Liquid Web.<sup>7</sup>

8. In 2011, the Board awarded 78 two-year grants to successful applicants under its OS Grant Program. HTT was one of the successful applicants. It received \$678,257 during the first year of funding, which was one of the largest grants awarded in fiscal year 2012. This amount represented approximately 23% of HTT's programming budget.<sup>8</sup>

9. The Trust used its grant money to increase the number of high schools served and theater arts experiences offered through its SpotLight Musical Theatre Program; expand the number of students reached via distance learning; explore and establish the programming for shows produced with several small theater organizations, and facilitate various components for the planning of a cultural district connecting the Walker Art Center to the Mississippi River Front.<sup>9</sup>

10. In order to receive the second year of funding under the two-year OS Grant, applicants had to satisfy three interim application requirements by 4:30 p.m. on January 13, 2013: (1) facilitate a site-visit by MSAB staff; (2) deliver hard copies of certain financial documents to MSAB; and (3) submit two documents to MSAB electronically through an online application system developed and maintained by MSAB.<sup>10</sup>

11. The deadline for submitting OS Grant applications to the Board was 4:30 p.m. on January 13, 2012. In the application instructions it issued to govern the January 2012 OS Grant application process, the Board stated:

Any organization that fails to submit all the required materials, or submits incomplete materials, will jeopardize the eligibility of its application.

Any items that are to be submitted electronically must be uploaded through the Arts Board's electronic submission page no later than 4:30 p.m. on Friday, January 13, 2012.<sup>11</sup>

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submit abbreviated interim applications in each of the following three years. MSAB Ex. 1 at 9; Test of S. Gens.

<sup>6</sup> Test of S. Gens.

<sup>7</sup> Test. of Michael Younger.

<sup>8</sup> Test. of T. Hoch.

<sup>9</sup> *Id.*

<sup>10</sup> Test. of S. Gens; HTT Ex. 1.

<sup>11</sup> HTT Ex. 1 at 21.

12. After OS Grant interim applications are submitted, MSAB staff members review the information to assess whether grantees have met their identified program goals and outcomes with the benefit of the first-year funds and continue to meet the eligibility requirements of the OS Grant Program.<sup>12</sup>

13. For fiscal year 2013, the Board received and deemed complete 97 full applications and 72 interim applications under its OS Grant Program.<sup>13</sup>

14. All 72 of the interim grant applicants that were deemed to have completed the three interim application requirements before the January 13, 2012, deadline ended up receiving second year grant funds.<sup>14</sup>

15. Board staff determined that two interim applications were not complete and that those applicants were therefore ineligible for funding under the OS Grant Program. The two applicants deemed ineligible by Board staff were HTT and the Minnesota Museum of American Art (MMAA).<sup>15</sup>

### **HTT's Interim Application**

16. Kathleen Wilinski is employed by HTT as the Corporate and Foundation Relations Manager. Ms. Wilinski has been affiliated with HTT since 2001. Prior to her current position, she worked as HTT's Membership Manager and Resource Development Director.<sup>16</sup>

17. Ms. Wilinski oversaw HTT's efforts to satisfy the interim OS Grant application requirements.<sup>17</sup>

18. In late December 2011, Ms. Wilinski and Lisa Lane, the Trust's Development Director, reviewed the grant application instructions available on the Board's website. They also participated in on-line training that was offered by the Board during which a slide show was presented regarding the grant application process. The training did not encompass how to use the on-line grant application system.<sup>18</sup>

19. On December 22, 2011, Amy Frimpong, a Program Officer with the Board, visited the HTT's headquarters to conduct the site visit required as part of the interim OS grant application. Ms. Wilinski, Lisa Lane, the Trust's Development Director, and other Trust staff participated in the site visit. The HTT staff gave Ms. Frimpong a tour of the facilities and provided her with documentation tracking HTT's progress on initiatives and demonstrating how well HTT had met its identified goals.<sup>19</sup>

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<sup>12</sup> Test. of S. Gens.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Test. of Kathleen Wilinski.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; Test. of Jane Johnson.

<sup>19</sup> Test. of K. Wilinski; Test. of Lisa Lane.

20. The site visit took about two hours. Both Ms. Wilinski and Ms. Lane thought that Ms. Frimpong seemed satisfied with what HTT had presented.<sup>20</sup>

21. In addition to participating in the site visit, Ms. Wilinski was responsible for submitting HTT's interim application electronically. Ms. Wilinski has submitted more than 40 grant applications on behalf of the Trust, at least half of which included an online or electronic submission requirement, and has never missed an application deadline.<sup>21</sup>

22. As noted above, the deadline for submission of the interim application was January 13, 2012, at 4:30 p.m. The Trust's application documents were largely completed on January 11, 2012. Ms. Wilinski set aside most of the day on January 12, 2012, to finalize, upload and submit the required documents to the Board.<sup>22</sup>

23. At about 11:49 a.m. on January 12, 2012, Ms. Wilinski printed the OS Grant Program overview and application instructions from the MSAB OS Grant Program home page on the MSAB website. There were about 35 pages of application instructions, which included sample worksheets.<sup>23</sup>

24. To submit an OS interim grant application electronically to the MSAB, an applicant must go to the Board's website, log in with a password, select the files to be uploaded from the applicant's hard drive, and then select (click on) the upload button when ready to upload the files.<sup>24</sup>

25. The MSAB webpage is designed in such a way that if a person does not interact with the server for more than 24 minutes, the session expires and the person is effectively "timed out."<sup>25</sup>

26. At approximately 11:50 a.m. on January 12, 2012, Ms. Wilinski attempted twice to log in to the online application system but received error messages. At 11:54 a.m., Ms. Wilinski registered a new account with the online application system by creating a new user name and password.<sup>26</sup>

27. After the two failed attempts, Ms. Wilinski successfully logged in to the MSAB's online application system at approximately 11:55 a.m. on January 12, 2012. At 11:57 a.m., Ms. Wilinski navigated to the interim application upload page and selected the two application documents (the application form and narrative) to be submitted from the HTT hard drive. Ms. Wilinski printed a paper copy of the two HTT interim application documents, placed them on a conference table near her computer, and asked her colleagues to review the documents and make any final revisions prior to her submitting them to the Board. Over the course of approximately two hours, Ms.

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<sup>20</sup> Test. of K. Wilinski; Test. of L. Lane.

<sup>21</sup> Test. of K. Wilinski.

<sup>22</sup> *Id.*

<sup>23</sup> HTT Ex. 1.; Test. of K. Wilinski.

<sup>24</sup> Test. of K. Wilinski.

<sup>25</sup> Test. of S. Gens; Test. of John Israel.

<sup>26</sup> Test. of K. Wilinski.

Wilinski's colleagues reviewed the documents and made a few final revisions. Ms. Wilinski made the corresponding revisions on the electronic versions of the documents and then saved the final version of the application form and narrative on HTT's hard drive.<sup>27</sup>

28. Between approximately 11:58 a.m. and 2:09 p.m. on January 12, 2012, while Ms. Wilinski and her co-workers were reviewing and revising the HTT application documents, Ms. Wilinski did not interact with the MSAB website or server.<sup>28</sup>

29. At about 2:07 p.m., Ms. Wilinski returned to the Board's interim application upload page and replaced the documents she initially selected for uploading with the newly-revised documents that she had just saved.<sup>29</sup>

30. At approximately 2:09 p.m. on January 12, 2012, Ms. Wilinski clicked the "upload" button on Board's interim application webpage. In response, the MSAB computer system generated a message to Ms. Wilinski's computer screen.<sup>30</sup>

31. There are twenty potential messages that can be generated in response to someone clicking the upload button. It is not possible to conclusively identify from forensic examination of the Trust's or the Board's computers which of the twenty possible messages Ms. Wilinski received.<sup>31</sup> The Board's system was not designed to log when or whether such messages were displayed to applicants.<sup>32</sup>

32. On all twenty possible messages, a banner of colored photographs depicting various artists and artistic venues runs across the top of the page under the heading "Minnesota State Arts Board." Under the MSAB banner on all 20 messages is the title "2013 Operating Support: Interim Application" and, under this title in smaller font is the statement "Step three of three."<sup>33</sup>

33. Of the twenty possible messages, only one confirms that the documents were successfully uploaded. The other nineteen indicate that some type of error has occurred. All but two of the error messages appear in boxes highlighted in a pinkish-red color that run the width of the screen under the statement "Step three of three." The error messages are highlighted in pinkish-red to make it obvious or conspicuous to users that an error has occurred.<sup>34</sup>

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<sup>27</sup> Test. of K. Wilinski; Test. of L. Lane; Test. of M. Younger; HTT Ex. 5.

<sup>28</sup> Test. of K. Wilinski.

<sup>29</sup> *Id.*; HTT Ex. 5.

<sup>30</sup> Test. of K. Wilinski; Test. of M. Younger; HTT Ex. 5.

<sup>31</sup> Test. of M. Younger; Test. of J. Israel.

<sup>32</sup> Test. of S. Gens; Test. of J. Israel.

<sup>33</sup> HTT Ex. 23.

<sup>34</sup> Ex. 23; Test. of S. Gens.

34. According to the Board's OS Grant application instructions, applicants that fail to upload all required items electronically "will receive an error message that will identify ways to remedy the error(s)."<sup>35</sup>

35. One of the error messages that is not highlighted in pinkish-red is one that should be generated if the applicant's session did not expire but for some reason the connection to the database fails. On this screen, nothing is written after the phrase "Step three of three." There is no explicit statement that an error has occurred and there is no identification of a way to remedy the error.<sup>36</sup> An applicant receiving this response may not know how to interpret it and might not realize that an error had occurred with respect to the submission of the documents.<sup>37</sup>

36. The other error message not highlighted in pinkish-red identifies the specific error that occurred under the heading "Step three of three."<sup>38</sup> An applicant receiving this message would likely know that an error had occurred. However, the message does not identify ways to remedy the error.<sup>39</sup>

37. The error message that informs applicants that they have "timed-out" is highlighted in pinkish-red and states: "You [sic] session has expired. log in to continue." This message does not make any reference to the file names of the documents that were attempted to be uploaded.<sup>40</sup>

38. The only computer-generated message that confirms that the documents were successfully uploaded identifies the applicant's user name and organization type, and lists the file names of the documents that were uploaded.<sup>41</sup> Nothing on this message is highlighted in pinkish-red. At the bottom of the screen is the following message: "It is recommended that you print this page and retain a copy for your records."<sup>42</sup>

39. After Ms. Wilinski clicked the upload button, the MSAB's online application system sent a message to her computer screen. The message identified the two documents as she had named them on her computer and indicated that they had been uploaded. The message did not indicate that an error had occurred or that her session had expired. Ms. Wilinski reviewed the message for "a couple seconds." She did not print a copy of the confirmation page. Based on the content of this message, Ms. Wilinski was confident that she had successfully uploaded the files and completed the electronic application document submission requirement for the interim grant application.<sup>43</sup>

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<sup>35</sup> HTT Ex. 1 at 21.

<sup>36</sup> HTT Ex. 23 at 5; Test. of S. Gens; Test. of J. Israel.

<sup>37</sup> Test. of S. Gens.

<sup>38</sup> HTT Ex. 23 at 7.

<sup>39</sup> *Id.*; Test. of S. Gens; Test. of J. Israel.

<sup>40</sup> HTT Ex. 23 at 1; Test. of S. Gens; Test. of J. Israel.

<sup>41</sup> HTT Ex. 23 at 20.

<sup>42</sup> *Id.*

<sup>43</sup> Test. of K. Wilinski.

40. If a person is connected to the server and pushes the upload button, a line or row of information should be created in the Board's database. No such line or row of information was created when Ms. Wilinski clicked on the upload button.<sup>44</sup>

41. If the Board's computer system was functioning as designed, Ms. Wilinski should have received an error message when she clicked on the upload button indicating that her session had expired.<sup>45</sup> A successful upload message should not have been generated unless there was a valid, non-expired session.<sup>46</sup>

42. Ms. Wilinski did, however, receive a successful upload message. She did not receive a "timed-out" or "session expired" message at any time.<sup>47</sup>

43. During the process of submitting the application, Ms. Wilinski verbally described the steps she was taking to co-workers whose work stations were nearby. After receiving the final message, she announced to them that the application was submitted and that they were done.<sup>48</sup>

44. Shortly thereafter, Ms. Wilinski contacted a courier service to deliver the required financial documents to the Board. Ms. Wilinski included a cover letter with the documents that she drafted which stated, in relevant part, "Please find the following documents enclosed to supplement Hennepin Theater Trust's interim application, submitted electronically on January 12, 2012 . . . ."<sup>49</sup>

45. The courier picked up the Trust's cover letter and financial documents on January 12, 2012, at 2:53 p.m. and delivered them to the MSAB at 3:14 p.m. on that same day.<sup>50</sup>

46. At about 4:11 p.m. on January 12, 2012, Ms. Wilinski sent an email to a colleague who helped prepare HTT's interim application materials. Ms. Wilinski attached to the email the "final submissions" she uploaded to the MSAB and confirmed that the Trust had delivered the financial documents to MSAB earlier in the afternoon. Ms. Wilinski stated that the Trust's application was "all set."<sup>51</sup>

47. The Board typically does not open materials as they are received from applicants, and no one from the Board read Ms. Wilinski's cover letter prior to the submission deadline. Once a grant application submission deadline passes, the Board begins to review the applications. The Board reviews full applications first, and then

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<sup>44</sup> Test. of S. Gens; Test. of J. Israel.

<sup>45</sup> Test. of J. Israel.

<sup>46</sup> *Id.*; Ex. 2.

<sup>47</sup> Test. of K. Wilinski.

<sup>48</sup> *Id.*; Test. of L. Lane; Test. of Helen Kouba.

<sup>49</sup> Test. of K. Wilinski; HTT Ex. 3 (emphasis added).

<sup>50</sup> Test. of K. Wilinski; HTT Ex. 4.

<sup>51</sup> Test. of K. Wilinski; HTT Ex. 7.

reviews the interim applications. The entire process takes 3 to 4 months with the Board giving its final approval on all grants (full and interim) at its July meeting.<sup>52</sup>

48. Sometime in early February 2012, the Board compiled the interim applications and realized that it had not received interim applications from six of the 78 applicants that were awarded grants in 2011. Ms. Gens asked Ms. Frimpong to contact the six applicants and find out why they had not submitted interim applications. Ms. Frimpong learned that four of the six had not attempted to submit an application because they had forgotten or missed the deadline or were confused regarding whether they needed to apply. The remaining two applicants, HTT and MMAA, told Ms. Frimpong that they believed they had, in fact, completed the interim application requirements. Ms. Frimpong informed Ms. Gens of her findings and told her that the Board had not received the electronic submission of application materials from either HTT or MMAA.<sup>53</sup>

49. On February 14, 2012, more than one month after the submission deadline, Ms. Frimpong notified the Trust that the Board could not locate the Trust's electronic application documents in its computer system. Ms. Frimpong initially stated, erroneously, that the Trust should have received an email from the Board confirming that the application documents had been uploaded successfully. Ms. Wilinski and her colleagues searched their email messages but were unable to find an email from the Board confirming receipt of their electronically submitted interim application documents.<sup>54</sup>

50. In an email to Ms. Frimpong sent on February 14, 2012, at 10:26 a.m., Ms. Wilinski stated that the Trust had not received an email confirmation regarding the electronic submission, but she had received a confirmation message from the MSAB on her computer screen when she uploaded the documents confirming that the documents had been uploaded successfully. Ms. Wilinski described the confirmation message generally as a "thank you for your submission" webpage." Along with this email, Ms. Wilinski attached the Trust's two electronic application documents and her January 12, 2012, cover letter submitted with the Trust's financial documents.<sup>55</sup>

51. Shortly after she sent the above email, Ms. Wilinski spoke with Ms. Frimpong on the telephone. Ms. Frimpong asked Ms. Wilinski if she had printed a copy of the confirmation message and Ms. Wilinski responded that she had not. Ms. Frimpong stated that other applicants had reported similar problems but they had printed a copy of their confirmation screen. According to Ms. Frimpong, if Ms. Wilinski had printed the confirmation page, HTT would be "okay," but that since she had not printed the confirmation, HTT would be deemed ineligible.<sup>56</sup>

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<sup>52</sup> Test. of S. Gens.

<sup>53</sup> *Id.*

<sup>54</sup> Test. of K. Wilinski; Test. of T. Hoch.

<sup>55</sup> Test. of K. Wilinski; HTT Ex. 6.

<sup>56</sup> Test. of K. Wilinski; Test. of L. Lane.

52. Once she was informed by Ms. Frimpong that the Board had not received HTT's and MMAA's electronic application documents through its online application system, Ms. Gens directed the Board's webmaster, Sean Kelly, to try to determine the cause. Ms. Gens noted that the Board's online application system was "far from perfect" and has "had any number of glitches."<sup>57</sup>

53. The MSAB computer system maintains a database to track files users' attempts to upload to the server as part of the application process. The coding adds a line of data to the database for each file submitted for uploading unless the file fails the "validity check routine" and returns an error message to the user or the user's session expires and the server is unable to reference the information.<sup>58</sup>

54. The MSAB computer system also maintains File Transfer Protocol (FTP) logs that show attempts by users to upload files from their browsers to the MSAB web site as part of the application process.<sup>59</sup>

55. Mr. Kelly searched the Board's database but found no evidence (or "electronic footprint") of HTT's or MMAA's application documents having been received electronically. The database and FTP log did not show that files from HTT or MMAA had been transferred or uploaded to the Board.<sup>60</sup>

56. In March of 2012, the Board mailed a survey to applicants and guarantors to gather feedback on the application process. Board staff explained that the survey was in response to complaints it had received about the application process and problems encountered with the system.<sup>61</sup>

57. In mid-April 2012, Ms. Gens sent letters to both HTT and MMAA informing them that they had been deemed ineligible for the second year allocation under the grant because their application and narrative documents had not been received electronically by the deadline.<sup>62</sup>

58. Although the amount of the OS Grant may vary from the first year to the second year depending on the Board's funds and the applications received, HTT had anticipated that it would receive second year funding under the OS Grant in an amount similar to the \$678,000 it had received during the first year, and had planned to add an additional showcase, employ more artists to go to schools, and engage in a variety of other activities. When it did not receive second-year funding, HTT had to pull back on several of the commitments it had made.<sup>63</sup>

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<sup>57</sup> HTT Ex. 9; Test. of S. Gens.

<sup>58</sup> Board Ex. 2.

<sup>59</sup> *Id.*

<sup>60</sup> Board Exs. 2-4; Test. of S. Gens; Test. of J. Israel.

<sup>61</sup> Test. of S. Gens.

<sup>62</sup> Test. of S. Gens; Test. of T. Hoch.

<sup>63</sup> Test. of T. Hoch; Test. of S. Gens.

## Other Applicants' Problems with Electronic Submission

59. In the days leading up to the January 13, 2012, OS Grant application deadline, MSAB's webmaster, Sean Kelly, responded to telephone calls and email messages from several applicants who reported problems with the online application process. Some applicants reported that they had received erroneous messages while transmitting their applications and others reported difficulty uploading their documents.<sup>64</sup> The majority of the reported errors related to people trying to submit full applications, rather than interim applications.<sup>65</sup>

60. It is the policy and practice of the Board to make exceptions to the online application submission requirement if the Board feels that an organization has made a "good faith effort" to submit its application documents electronically but is unable to do so for whatever reason. In such instances, the Board will give the organization the "benefit of the doubt" and permit the organization to submit its documents by email. This is not the preferred method of transmission, but the Board permits this "reasonable accommodation" so that technology does not become a barrier to funding.<sup>66</sup>

61. The Board typically grants about five exceptions to the electronic submission requirement each year and permits those applicants to submit their documents via email.<sup>67</sup>

62. Before the OS Grant application submission deadline, MSAB granted exceptions to the online application submission requirement for two OS grant applicants who, while trying to submit their documents electronically, experienced undiagnosed "connectivity problems" and "time-out issues." The applicants, Park Square Theater and the St. Paul City Ballet, contacted Mr. Kelly and he granted them an exception and authorized them to submit their application documents via email, bypassing the online application system altogether.<sup>68</sup> Both organizations sent their required documents by email to the Board prior to the 4:30 p.m. deadline on January 13, 2012.<sup>69</sup>

63. Another applicant reported making several attempts to upload application materials only to receive the error message "filename cannot be empty." Mr. Kelly apologized for the "erroneous error message" and verified that the organization's documents had been received.<sup>70</sup>

64. After the OS Grant application submission deadline, the MSAB realized that it had received corrupted files or that documents were missing from at least fourteen OS grant applicants. The MSAB allowed these applicants to submit "replacement materials" after the deadline (in some cases, several months after the

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<sup>64</sup> Test. of M. Younger; HTT Exs. 13, 26.

<sup>65</sup> Test. of M. Younger; HTT Ex. 13.

<sup>66</sup> Test. of S. Gens.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; HTT Exs. 8, 26.

<sup>69</sup> Test. of S. Gens; HTT Exs. 8 and 26.

<sup>70</sup> HTT Ex. 13.

deadline). The MSAB accepted the replacement materials without diagnosing or attempting to diagnose the cause of the transmission problem and without confirming that the replacement materials had not been modified after the deadline and were, in fact, the same documents that the applicants attempted to upload before the deadline.<sup>71</sup>

65. Certain materials were missing from the January 2012 applications of two organizations. The Board's database reflected that these two organizations had attempted to upload all the files but that, when they were doing so, one document from each organization was "somehow dropped in the FTP transfer process." The Board allowed both organizations' applications to go forward for review without the missing documents.<sup>72</sup>

66. Had Ms. Wilinski been aware that there was any problem with the submission of HTT's application documents, and had she called or emailed Mr. Kelly to report the problem, he would have either figured out the problem or allowed her to submit the application documents by email.<sup>73</sup> Likewise, had Mr. Kelly seen Ms. Wilinski's January 12, 2012, cover letter that accompanied the Trust's financial documents prior to the deadline, he would have verified that the application materials had been successfully uploaded as Ms. Wilinski indicated and "sorted out the problem" like he did for other grant applicants.<sup>74</sup>

67. Jane Johnson, the former Director of Development for the MMAA, oversaw the MMAA's interim OS Grant Application process.<sup>75</sup> Ms. Johnson has more than 25 years of fundraising experience and has successfully submitted more than 100 grant applications on behalf of various organizations, several of which required an electronic submission of some kind. Ms. Johnson is currently the Director of Development for the University of Minnesota Extension.<sup>76</sup>

68. Like Ms. Wilinski, Ms. Johnson believed she had successfully uploaded and electronically submitted MMAA's interim OS Grant application prior to the deadline. Ms. Johnson logged in on the MSAB's online application system on January 13, 2012, selected the two application documents to be uploaded, and clicked the upload button. A message from MSAB's computer was displayed on Ms. Johnson's computer screen. Ms. Johnson believes the message confirmed that the MMAA's interim application documents had been uploaded successfully to the MSAB. The entire process took Ms. Johnson less than five minutes.<sup>77</sup>

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<sup>71</sup> Test. of S. Gens.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Deposition of Sean Kelly at 136-38.

<sup>75</sup> Test. of Jane Johnson.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

69. Like Ms. Wilinski, the confirmation message that Ms. Johnson saw had a MSAB banner at the top and listed the file names of the two documents she submitted.<sup>78</sup>

70. Ms. Johnson did not print a copy of the confirmation screen she received.<sup>79</sup>

71. The Board denied MMAA second year funding because it did not receive the electronic submission of MMAA's interim application and narrative documents by the deadline.<sup>80</sup>

72. Based on the experiences of HTT and MMAA and the issues experienced by other applicants (including erroneous error messages and connectivity problems that occurred when some applicants attempted to upload or submit their applications), the Board's online application process was not functioning as designed on January 12 and 13, 2012.<sup>81</sup>

### **Procedural Findings**

73. HTT appealed to the State Arts Board the determination of the Board's staff that HTT was ineligible for funding.

74. At its monthly meeting on June 6, 2012, the Board considered HTT's appeal and the evidence presented by HTT. The Board agreed that HTT had timely filed the hard copies of the materials that were required to be submitted as part of its interim application, but concluded that HTT had failed to show that it had timely submitted the materials that were required to be submitted electronically. The Board further determined that HTT had failed to show that the Board violated any of its policies or procedures. The Board therefore denied HTT's appeal and continued to find that HTT was ineligible to receive the second-year funding in fiscal 2013. The Board also denied MMAA's appeal for the same reasons.<sup>82</sup>

75. HTT requested a contested case hearing, and this matter was referred to the OAH.

76. The Board served a Notice and Order for Prehearing Conference and Hearing on the Trust by mail on August 13, 2012. A prehearing conference was held on September 13, 2012, and the hearing was held as scheduled on Friday, November 2, 2012, and Monday, November 5, 2012.

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<sup>78</sup> Test. of J. Johnson.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> HTT Exs. 5, 13 and 26; Test. of M. Younger; Deposition of S. Kelly at 88-89. At the time of the hearing, the Board anticipated that it would roll out a new online grant system called "Grant Life Cycle" in December 2012. The decision to initiate the new system was made in approximately May or June of 2011. Test. of S. Gens; HTT Ex. 21.

<sup>82</sup> Test. of S. Gens.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Board and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 129D.04, and Minn. R. 1900.1110, subp.3.

2. The Board gave proper and timely notice of the hearing in this matter.

3. The Trust bears the burden of proving by a preponderance of the evidence that it is eligible for second-year operating support funding under its two-year OS Grant and that the Board did not follow its policies and procedures in determining that the Trust was ineligible for funding.<sup>83</sup>

4. The rules governing the process for obtaining grants and financial assistance from the Board state that: "All applications must be received at the board office by the deadline in the current program information. A late application shall not be considered by the board."<sup>84</sup>

5. The OS Grant application instructions issued by the Board to govern the January 2012 OS Grant application process stated that "[a]ny organization that fails to submit all the required materials, or submits incomplete materials will jeopardize the eligibility of its applications."<sup>85</sup>

6. The Trust demonstrated by a preponderance of the evidence that it made a good faith attempt to submit its application documents electronically prior to the deadline and received a confirmation message from the Board's computer system. For unknown reasons, the HTT documents were not successfully uploaded to the Board's server and thus were not received by the Board.

7. The Trust demonstrated by a preponderance of the evidence that the Board failed to follow its policies and practices when it did not allow the Trust to submit replacement materials after it was discovered that the documents had not been successfully uploaded to the Board's server and found the Trust to be ineligible for second-year funding. Specifically, the Trust demonstrated by a preponderance of the evidence that the Board has a policy and practice of granting exceptions to the online application submission requirement if an applicant reports experiencing technical problems and demonstrates it made a good faith attempt to submit its application documents using the Board's online application system before the submission deadline. In addition, the Trust demonstrated by a preponderance of the evidence that the Board has a policy and practice of allowing applicants to submit replacement materials after the deadline has passed if the Board determines that some of the files that were submitted by the applicants were corrupted. Finally, the Trust demonstrated by a

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<sup>83</sup> Minn. R. 1900.1110, subp. 1.

<sup>84</sup> Minn. R. 1900.0810, subp. 2.

<sup>85</sup> HTT Ex. 1 at 21.

preponderance of the evidence that the Board has a policy and practice of allowing applications to go forward for review even if some documents are missing as long as the Board's database reflects that the applicants had attempted to upload all of the files.

8. The Trust has demonstrated by a preponderance of the evidence that it is eligible to be considered for second-year operating support funding from the Board for fiscal year 2013.

9. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

Based upon the Conclusions, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Minnesota State Arts Board:

- (1) RESCIND Its prior determination that the Trust is ineligible for second-year operating support funding under its two-year OS Grant; and
- (2) ACCEPT the interim grant application materials that the Trust prepared and attempted to submit before the January 13, 2012, deadline and, if appropriate, award the Trust its second year of funding under the OS Grant.

Dated: March 29, 2013

s/Barbara L. Neilson  
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BARBARA L. NEILSON  
Administrative Law Judge

Reported: Digitally recorded; no official transcript prepared.

## NOTICE

This report is a recommendation, not a final decision. The Board will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Board shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Board must consider the exceptions in making a final decision. Parties should contact Sue Gens, Executive Director, Suite 200, 400 Sibley Street, St. Paul, MN 55101, (651) 215-1609, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and Administrative Law Judge of the date the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the Board is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

The web cache from the computer of Trust employee Kathleen Wilinski reflects that Ms. Wilinski logged onto the Board's website on January 12, 2012, a full day prior to the deadline for completing its application for the Trust's second year of funding under its OS Grant. The web cache shows that she ultimately selected two application documents for uploading and that she clicked on the "upload" button. The parties agree that it is impossible to determine with precision from available information which of the twenty possible messages was generated in response. They also agreed that there is no evidence that either of the files she selected for uploading in fact made it to the Board.

The Board's expert witness, John Israel, testified that the Board's online grant application system was designed to "time out" after 24 minutes of no interaction with the server. Because Ms. Wilinski and other Trust employees spent approximately two hours checking over and revising the two documents before pressing the "upload" button, Mr. Israel argued that Ms. Wilinski must have received an error message that said her session had expired and she would need to log in again. He also contended that there was no mechanism for the Board's system to have sent a confirmation message to Ms. Wilinski unless her upload had, in fact, been successful. Mr. Israel acknowledged that his opinions were based on how the system was designed to function.

However, the Trust's expert, Michael Younger, provided persuasive testimony that, based upon the number of errors reported on January 12 and 13, 2012, the MSAB

computer system was not, in fact, functioning as it was designed during the relevant time period. Based on his forensic investigation, including the web cache from Ms. Wilinski's computer and his review of the record, Mr. Younger testified that he believes that Ms. Wilinski somehow received a message confirming that the files were uploaded even though that was not the case. Mr. Younger indicated that there is no way to know what a computer system is doing if it is not functioning as it is designed to function, and stated that "anything could happen." He stated that it is almost impossible to determine after the fact why the errors occurred. He emphasized that computers crash at times despite being designed to work correctly, and errors occur despite the manner in which the code is written. For example, he testified that computer systems may be affected by hardware issues, network issues, and whether or not other applications are running concurrently. Mr. Younger further noted that the Board outsources its website to Liquid Web, a third party, and opined that there could have been problems that occurred on Liquid Web during that time period.

Moreover, Ms. Wilinski, who is experienced in submitting electronic grant applications on behalf of HTT, testified in a straightforward and consistent manner that she did not receive a "session expired" or other error message when she clicked on the upload button, but instead received a message that listed the file names of the two documents she had uploaded. It is undisputed that the only message that would have listed the names of files was a successful upload confirmation message. In a cover letter to the Board that accompanied HTT's financial documents delivered via courier later that same day, Ms. Wilinski reiterated her belief that the application had been "submitted electronically on January 12, 2012." Ms. Wilinski's belief that she had successfully submitted the electronic application documents is also supported by the testimony of her co-workers, who said Ms. Wilinski called out to them to let them know that the documents were uploaded and the submission of the application was complete. Finally, the testimony of Jane Johnson of the Minnesota Museum of American Art independently corroborated Ms. Wilinski's position that upload confirmation messages were generated even when the files were not successfully uploaded to the Board's server. The Administrative Law Judge found Ms. Wilinski's testimony, as supported by Mr. Younger, Ms. Johnson, and her co-workers, to be persuasive.

The Board emphasizes that its rules state that applications must be *received* by the Board by the deadline. However, the Board's application instructions state only that an organization must *submit* the materials by the deadline or *jeopardize* its eligibility. Here, Ms. Wilinski did click on the upload button to submit the documents prior to the deadline.

In addition, the Trust demonstrated by a preponderance of the evidence that the Board failed to follow its policies and practices when it did not allow the Trust to submit replacement materials after it was discovered that the documents had not been successfully uploaded to the Board's server and found the Trust to be ineligible for second-year funding. Specifically, the Trust demonstrated by a preponderance of the evidence that the Board has a policy and practice of granting exceptions to the online application submission requirement if an applicant demonstrates it made a good faith attempt to submit its application documents using the Board's online application system

before the submission deadline. Ms. Gens testified that it was the policy of the Board not to allow technology to become a barrier to funding. She indicated that the Board typically grants as many as five exceptions to the online application submission requirement per year. With respect to the January 2012 application deadline, the record established that the Board granted several exceptions to the online submission requirement and gave numerous grant applicants an opportunity to submit their application documents via email, both before and after the submission deadline. The Board granted an exception to at least two applicants who reported experiencing “connectivity” and “time-out” problems by giving them permission to bypass the online application system and submit their application documents via email. The Board also granted exceptions for twelve applicants to submit application documents via email to replace corrupted documents, in some cases months after the deadline. Finally, the Trust demonstrated that the Board has a policy and practice of allowing applications to go forward for review even if some documents are missing as long as the Board’s database reflects that the applicants had attempted to upload all of the files.

The difficulty for the Trust is that it was not aware that the Board had not received the materials it had submitted electronically until approximately February 14, 2012. Because the Trust had received a confirmation message, it had no reason to call the Board or raise any issue regarding the Board’s receipt of the materials. After the Board notified the Trust of the problem, the Trust promptly provided the Board with copies of the materials it had made a good faith attempt to upload prior to the deadline. Had the Trust been aware that there was any issue with the submission, Ms. Wilinski could have emailed or called Mr. Kelly and Mr. Kelly would have either diagnosed the problem or permitted her to submit the documents via email. Mr. Kelly also stated in his deposition that had he seen Ms. Wilinski’s January 12, 2012, cover letter attached to the Trust’s financial documents, he would have verified that the Trust’s application documents were successfully uploaded.

Based upon the record as a whole, the Administrative Law Judge concludes that the Trust should be deemed to have submitted a timely interim application and be found eligible to be considered by the Board for second-year funding. The Board has a policy of granting good faith exceptions to other applicants, and fairness dictates that it do the same in this case. It is therefore recommended that the Board rescind its determination that the Trust is ineligible for second-year operational support funding, accept the interim grant application materials that the Trust prepared and attempted to submit before the January 13, 2012, deadline and, if appropriate, award the Trust its second year of funding under the OS Grant.

**B. L. N.**